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In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the word "treaty" in Section 106 of Pub. L. No. 92-129, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all binding international agreements concluded by the President with the host country or is limited to agreements consented to by the Senate pursuant to Article II, Section 2 of the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the parties to this case are petitioner John F. Lehman, Jr., Secretary of the Navy, and respondents Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 642 F.2d 553. The opinion of the district court (Pet. App. 20a-39a) is reported at 467 F. Supp. 960. The administrative decision of the Navy (Pet. App. 41a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a-47a) was entered on September 15, 1980, and a petition for rehearing was denied on December 18, 1980 (Pet. App. 48a-49a). On March 13, 1981, the

Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on May 15, 1981. The Court granted the petition on October 5, 1981. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

STATEMENT

1. In 1944 Congress authorized the President, "[a]fter negotiation with the President of the * * * Philippines * * * [and] by such means as he finds appropriate[,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States." 22 U.S.C. 1392. Pursuant to this

broad grant of authority and to its Filipino counterpart, in 1947 the United States and the Republic of the Philippines entered into a 99-year Military Bases Agreement (MBA), 61 Stat. 4019, T.I.A.S. No. 1775. The MBA grants the United States the use of various military facilities in the Philippines in exchange for certain commitments by the United States. This agreement has been amended periodically, most recently on January 7, 1979 (30 U.S.T. 863, T.I.A.S. No. 9224).[1]

The United States' continued use of these military facilities depends in large part on its respect for Philippine sovereignty and on stable labor relations with local employees. The MBA itself, however, contains no provisions concerning the employment of local nationals by the United States Armed Forces. To fill this void, and to assure a stable and reliable local workforce necessary to American defense interests in the Pacific, the United States and the Philippines negotiated a Base Labor Agreement (BLA), 19 U.S.T. 5892, T.I.A.S. No. 6542, on May 27, 1968, as a supplement to the MBA (Pet. App. 50a-62a). Article I of the BLA provides, *inter alia*, for the

[1] The major American military installations currently operating in the Philippines pursuant to the MBA are Clark Air Base and the Naval Facility at Subic Bay. Wallace Air Station, John Hay Air Base and San Miguel Naval Communications Station serve as supporting facilities. Clark Air Base supports United States air operations in the Western Pacific and East Asia, and Subic Bay supports the Seventh Fleet's operations in the Western Pacific and Indian Ocean. Together these facilities comprise the logistics hub for United States operations in Southeast Asia, the Southwest Pacific and the Indian Ocean areas and perform a significant range of essential services not available elsewhere in the region.

preferential employment of Filipino citizens at military facilities used by the United States in the Philippines (*id.* at 51a):

> *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. In 1971, Congress enacted Pub. L. No. 92-129, Section 106, 85 Stat. 355, now codified at 5 U.S.C. (Supp. III) 7201 note.[2] Section 106 prohibits employment discrimination by the Department of Defense or any of its officers or employees against American citizens or dependents of members of the United States Armed Forces at Department of Defense installations and facilities in foreign countries, unless such discrimination is permitted or required by "treaty."

At the time Section 106 was enacted, the United States was a party to more than a dozen binding international agreements that, like the BLA, provided some form of employment preference for local nationals but were not "treaties" within the meaning

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[2] Section 106 was previously codified at 5 U.S.C. 7151 note. The opinions and briefs below cite the prior codification.

of Article II, Section 2, Clause 2 of the United States Constitution.[3] Since the enactment of Section 106,

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[3] Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *."

In addition to the BLA, the following agreements were in effect at the time Section 106 was enacted: Mutual Defense Assistance Agreement, Nov. 21, 1956, United States-Republic of China, 7 U.S.T. 3411, 3412, T.I.A.S. No. 3713 (¶ 4); Defense Agreement Concerning Construction of Scatter Wave Radio Facility in Vicinity of Yangmingsham, Taiwan, Aug. 6, 1958, United States-Republic of China, 13 U.S.T. 2136, 2137, T.I.A.S. No. 5175 (¶ 2); Defense Agreement Concerning Construction of Communications Facility in Vicinity of Kaohsuing, Taiwan, Apr. 15, 1960, United States-Republic of China, 13 U.S.T. 2155, T.I.A.S. No. 5176; Defense Agreement Concerning Construction of Scatter Wave Control Facility in Vicinity of Yangmingshan, Taiwan, Feb. 28, 1962, United States-Republic of China, 13 U.S.T. 2158, T.I.A.S. No. 5177; Agreement Concerning the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, United States-Republic of China, 17 U.S.T. 373, 375, T.I.A.S. No. 5986 (Art. III.3); Agreement Concerning the Status of United States Personnel and Property (Annex), May 8, 1951, United States-Iceland, 2 U.S.T. 1533, 1542, T.I.A.S. No. 2295 (Art. VI); Agreement Concerning Bahamas Long Range Proving Ground: Administrative Arrangements Regarding Sites in Ascension Island, Aug. 24-25, 1959, United States-United Kingdom, 10 U.S.T. 1453, 1454, T.I.A.S. No. 4296; Agreement Concerning Oceanographic Research Stations in the Bahama Islands, May 12, 1960, United States-United Kingdom, 11 U.S.T. 1405, 1406, T.I.A.S. No. 4479; Agreement Concerning Atlantic Undersea Test and Evaluation Center in the Bahama Islands, Oct. 11, 1963, United States-United Kingdom, 14 U.S.T. 1431, 1441, T.I.A.S. No. 5441 (Art. IX); Agreement Concerning Defense Areas, Feb. 10, 1961, United States-West Indies, 12 U.S.T. 408, 413, T.I.A.S. No. 4734 (Art. VI); Agreement Concerning Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966,

the United States has entered into several additional international agreements that afford employment preferences to citizens of host countries but are not Article II treaties.[4] We are advised by the Department of State that no Article II treaty ever has addressed the subject of preferential hiring of local nationals at military facilities used by the United States abroad.[5]

United States-United Kingdom, 18 U.S.T. 28, 30, T.I.A.S. No. 6196 (¶ 7(a)). Memorandum of Understanding for the Establishment of the SEATO Clinical Research Center, Apr. 1 & 25, 1963, United States-Thailand, 14 U.S.T. 459, 462, T.I.A.S. No. 5340 (Art. IV. 2), as amended; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, United States-Australia, 14 U.S.T. 506, 520, T.I.A.S. No. 5349 (Art. 15).

[4] Agreement Implementing Article V of the Treaty of Friendship and Cooperation, Jan. 31, 1976, United States-Spain, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361 (Art. XXXIII); Agreement Concerning Defense Areas and Facilities, Dec. 14, 1977, United States-Antigua, 29 U.S.T. 4183, 4187, T.I.A.S. No. 9054 (Art. VI); Agreement Concerning a Tracking Station of Mahe Island, June 29, 1976, United States-Seychelles, 27 U.S.T. 3709, 3721, T.I.A.S. No. 8385 (Art. XXIII); Agreement for Cooperation on Defense and Economy Between the United States and Turkey, Supplementary Agreement Number 3 on Installations, Mar. 29, 1980, Art. VI, T.I.A.S. No. 9901, at 18; Agreement in Implementation of Article IV of the Panama Canal Treaty, Art. VII, Sept. 7, 1977 (not yet published).

[5] This statement should be qualified in one minor respect. Article IX, paragraph 4 of the Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846 (NATO SOFA), which is an Article II treaty, provides that once a "sending State" (the state to which the military force belongs) determines to hire local nationals,

3. In March 1978, respondents Rossi, Bumgarner, Frierson and Perry were notified that their jobs as game room managers at the United States Naval Facility at Subic Bay were being converted into local national positions in accordance with Article I of the BLA and that they would be discharged from their employment with the Navy (Pet. App. 21a). Respondent Rossi filed what he styled as a "class action" administrative complaint, alleging that the Navy's termination of respondents' employment constituted unlawful discrimination against American citizens in violation of Section 106 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

"[t]he conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of [local national] workers, shall be those laid down by the legislation of the receiving State." Thus, there conceivably could arise a situation in which, by virtue of NATO SOFA's incorporation of a local law more favorable to employees than its counterpart under United States law, a United States citizen or dependent would be afforded less favorable treatment (in aspects of employment other than the initial hiring) than a local national would receive. Indeed, in *Collins* v. *Brown*, Civ. No. 79-2598 (D.D.C., filed Sept. 28, 1979), currently pending on cross motions for summary judgment, two employees of the Army and Air Force Exchange Service (AAFES) claim that their positions with AAFES were downgraded, and a third employee claims that his employment with AAFES was terminated, in favor of local nationals, as a result of Germany's broader job security and retention protections. In *Collins*, the Secretary of Defense is relying on both Article IX, paragraph 4 of NATO SOFA and Article 56 of the Supplementary Agreement to the North Atlantic Treaty Organization Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, 593-596, T.I.A.S. No. 5351, which incorporates in greater detail the applicable German labor laws.

(Pet. App. 22a; A. 226-232).[6] The Equal Employment Opportunity Office of the Navy rejected the complaint, concluding that it had no authority to modify the BLA (Pet. App. 41a-45a). In June 1978, respondent Rossi appealed to the Civil Service Commission Appeals Review Board (A. 233).

While the administrative appeal was pending, the four respondents were notified that their employment was to be terminated ahead of schedule pursuant to a reduction in force (Pet. App. 23a). Asserting jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. 1331(a) and 1343(4), respondents sought a temporary restraining order enjoining petitioners from discharging them and barring them from the base. The United States District Court for the District of Columbia granted the restraining order, but subsequently denied respondents' motion for a preliminary injunction (Pet. App. 23a).

On cross-motions for partial summary judgment, the parties agreed that the validity under Section 106 of respondents' discharge depended on whether the word "treaty," as used in that statute, encompasses binding international agreements such as the BLA or is limited to treaties in the constitutional sense—*i.e.*, agreements consented to by the Senate in accordance with Article II. The district court concluded that the word "treaty" as used in Section 106 should be construed in the broader international law sense (Pet. App. 20a-39a). The court rejected respondents' contention that Congress' mere use of the word

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[6] "A." refers to the joint appendix filed in the court of appeals. On November 16, 1981, the Court granted the government's motion to dispense with the requirement of filing a joint appendix in this Court.

"treaty" in the statute is dispositive, noting (*id.* at 29a) that several courts, including this Court (see *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912)) "have held that executive agreements were 'treaties' within the meaning of an Act of Congress," and that Congress' imprecise drafting of Section 106 buttressed the conclusion that the word was not intended to have a restricted meaning (Pet. App. 30a). In addition, the court found (*id.* at 33a-34a) that "the legislative history would argue against [respondents'] contention that Congress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations."

In reaching this conclusion, the district court recognized (Pet. App. 37a) that it was treading "in an area fraught with sensitivity and affecting foreign affairs of the United States." The court observed (*id.* at 36a) that there were 12 international agreements containing employment preferences for local nationals at overseas American bases in effect when Section 106 was enacted, that none of those agreements had been submitted to the Senate for its advice and consent, and that two more such agreements had been entered into after the enactment of Section 106. Because the employment preference provisions contained in those agreements were part of the *quid pro quo* for the acquisition and retention of the United States' use of military facilities in foreign countries, the court concluded that it "should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent" (*id.* at 37a; emphasis in original).[7]

[7] Based on its conclusion that the BLA is a "treaty" within the meaning of Section 106, the district court also held (Pet.

The District of Columbia Circuit reversed (Pet. App. 1a-19a). The court of appeals acknowledged (*id.* at 8a-9a; footnote omitted) that "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under Article II of the Constitution, * * * it does not invariably carry such a meaning" and that "[t]he meaning to be attributed to the word 'treaty' ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears." The court of appeals also observed, after a review of the legislative history, that "the evidence [of congressional intent] is not extensive" (*id.* at 14a). Nonetheless, the court concluded that Congress had used the word "treaty" in Section 106 in its Article II sense and that it accordingly had intended, *sub silentio*, to compel the President either to terminate or to violate all existing international agreements containing local national employment preference provisions. In the court's view (*id.* at 15a n.30), Section 106 partially repealed the 1944 Act authorizing the President to negotiate and conclude agreements with the Philippines "by such means as he finds appropriate" (see page 2, *supra*) by withdrawing one method as inappropriate—agreements to employ local nationals, in preference to United States citizens or dependents of United States service members, for civilian positions on overseas mili-

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App. 37a-38a) that the specific provision in Section 106 permitting discrimination against American citizens in employment at overseas bases controls over the more general prohibitions against employment discrimination in Title VII. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

tary bases, unless such agreements were consented to by two-thirds of the Senate.[8]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court of appeals invalidates a key provision of this country's Base Labor Agreement with the Republic of the Philippines and threatens the security and continued existence of the United States' rights to use military bases located in that country. Moreover, the decision below casts doubt on a dozen other international agreements containing local national employment preferences that were negotiated and concluded by the President as part of an effort to maintain an American military presence on foreign soil. This holding, if not reversed, could seriously disrupt United States relations with several foreign countries and threaten our national security.

We submit that "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). As we show below, Congress "said so expressly" neither in the statutory language of Section 106 nor in the legislative history of that provision. To the contrary, Congress' use of the word "treaty" in Section 106 is consistent with an intent to include all international agreements, not only Article II treaties, and the legislative history shows that the section was directed at eliminating employment preferences im-

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[8] In view of its conclusion that the BLA is not a "treaty" within the meaning of Section 106, the court of appeals did not reach the question whether the BLA hiring preference provision violates Title VII (Pet. App. 19a n.36).

posed by individual military commanders rather than as part of binding international agreements.

A.

Congress' use of the word "treaty" in Section 106 does not indicate an intent to limit the "treaty" exception to Article II treaties. As the court of appeals acknowledged (Pet. App. 5a), the term "treaty" has two distinct usages in the United States. When used in its international relations sense, the word "treaty" refers to all binding agreements between nations that are governed by international law, regardless of the manner in which they are brought into force. In its constitutional sense, however, the term is limited to those international agreements that are brought into force pursuant to the power granted to the President by Article II, Section 2, Clause 2 of the Constitution to make treaties "by and with the Advice and Consent of the Senate, * * * provided two thirds of the Senators present concur; * * *."

The meaning to be attributed to the word "treaty" in a statute ultimately depends upon the intent of Congress. In determining that intent, the courts have focused on the context in which the word appears, the legislative history, and the purposes to be served by the statutory provision. *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912). Here, the context strongly suggests that Congress intended the word "treaty" in Section 106 to be defined according to the usages of international law. Section 106 has no domestic impact; its only impact is upon actions of the United States in those foreign countries in which the Department of Defense is permitted by international agreement to use military facilities or installations. Because Congress in Section 106 was

legislating in an area touching directly on international relations, it is reasonable to assume that it used the word "treaty" in that statute in its international relations sense, as including all forms of binding agreements between the United States and a foreign country.

This conclusion is buttressed by the imprecise drafting of Section 106. As the district court noted (Pet. App. 30a), the language Congress employed elsewhere in the section is so confusing as to rebut any notion that it used the word "treaty" in the strict and technical sense suggested by respondents.

B.

In determining the meaning of an ambiguous statutory provision, it is appropriate to rely on "generalized axioms of experience in construing legislation." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Here, the rule that repeals by implication are disfavored and the presumption that Congress will not place the United States in violation of a binding international obligation counsel against the result reached by the court of appeals.

Limiting the meaning of the word "treaty" in Section 106 to Article II treaties would not only partially repeal the 1944 Act authorizing the President to withhold, acquire or retain military bases in the Philippines "by such means as he finds appropriate" (22 U.S.C. 1392). It would also require the United States to breach what the Philippines views as a key provision of the BLA, with unpredictable consequences for our relations with that nation and for the United States' continued use of military facilities located there. Moreover, the United States remains a party to several other binding international agree-

ments that, like the BLA, provide some form of employment preference for local nationals in exchange for the right to maintain a United States military presence on foreign soil, but are not Article II treaties. The court of appeals' construction of Section 106 casts the validity of these agreements in doubt as well. Such drastic consequences should not be attributed to Congress in the absence of any evidence of an intent to bring them about.

C.

No such intent appears in the legislative history of Section 106. To the contrary, the legislative history suggests that Congress did not intend to disturb any international agreement. First, the legislative reports and debates contain no reference to the several international agreements then in existence that established local national employment preferences but were not Article II treaties. Moreover, at the time Section 106 was enacted, the Article II format never had been employed to establish local hiring preferences. It is most unlikely that Congress intended to invalidate more than a dozen binding international agreements without even alluding to them, while enacting a statute addressing a situation that had never existed. Furthermore, the consistent statements of Senator Schweiker, the sponsor of Section 106, clearly explain that that provision was directed only against preferential hiring practices mandated by the actions of individual base officers, and not against binding commitments of this country given in exchange for important rights to use military facilities abroad.

D.

Finally, since the enactment of Section 106, the Department of State and the Department of Defense have continued to negotiate and implement international agreements other than Article II treaties that contain local national employment preferences. Congress has been informed of these agreements pursuant to the Case Act, 1 U.S.C. (Supp. III) 112b, which requires congressional notification of all international agreements other than Article II treaties, and through testimony presented to congressional committees. Congress, however, has not chosen to alter this consistent administrative construction.

ARGUMENT

THE WORD "TREATY" AS USED IN SECTION 106 OF PUB. L. NO. 92-129 INCLUDES ALL INTERNATIONAL AGREEMENTS BINDING ON THE UNITED STATES

A. The Language of Section 106 May Reasonably Be Construed to Include All Binding Agreements Within Its "Treaty" Exception

As with any case involving the interpretation of an Act of Congress, "we begin with the language of the statute." *Haig* v. *Agee*, No. 80-83 (June 29, 1981), slip op. 8. Accord, *American Textile Manufacturers Institute, Inc.* v. *Donovan*, No. 79-1429 (June 17, 1981), slip op. 16. Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides in pertinent part:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Depart-

> ment of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.

The word "treaty," read in context, includes binding international agreements such as the BLA.

1. ***The Word "Treaty" Has Two Different Meanings in the United States, Depending on the Context in Which it is Used***

a. As both the district court and the court of appeals recognized (Pet. App. 5a-9a, 25a-26a), the word "treaty" has two distinct but commonly accepted usages in the United States. When used in its international relations sense,

> "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation * * *.

Vienna Convention on the Law of Treaties, May 23, 1969, Art. 2, ¶ 1(a), *reprinted in* 63 Am. J. Int'l L. 875, 876 (1969).[9] See also *Restatement of the Foreign Relations Law of the United States* § 302, comment *b* (Tent. Draft No. 1, Apr. 1980). Consent to such a treaty may be expressed in any of a variety

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[9] Although the Vienna Convention is not yet in force for the United States, it has been recognized as an authoritative source of international treaty law by the courts (see, *e.g.*, *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33, 36 (2d Cir. 1975), cert. denied, 429 U.S. 980 (1976)) and the executive branch (see, *e.g.*, letter of submittal of Vienna Convention to the President from the Secretary of State 1 (Oct. 18, 1971)).

of forms: "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." Vienna Convention on the Law of Treaties, *supra*, Art. 11, 63 Am. J. Int'l L. at 878. Thus, the word "treaty," when used in this context, includes all binding written agreements among nations that are governed by international law,[10] regardless of the manner in which the agreements are brought into force.

In its constitutional sense, however, the word "treaty" refers to an international agreement that is brought into force pursuant to the power granted to the President by Article II, Section 2, Clause 2 of the Constitution to make treaties "by and with the Advice and Consent of the Senate, * * * provided two thirds of the Senators present concur; * * *."

b. Despite these distinct meanings, the word "treaty" is frequently used imprecisely. Both Con-

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[10] The principle that "treaties," in the international relations sense, are agreements among nations that are governed by international law (as well as the presumption that any agreement among nations is governed by international law) has been codified in new regulations issued by the Department of State to implement the Case Act, 1 U.S.C. (Supp. III) 112b (see note 25, *infra*). 46 Fed. Reg. 35918 (1981). See also *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 241 (1976) (responses by Monroe Leigh, Legal Adviser, Department of State, to questions submitted by the Subcommittee); *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 329-330 (1972) (statement of J. Fred Buzhardt, General Counsel, Department of Defense).

gress and the courts have used the term in its international relations sense and its constitutional sense without making clear which meaning is intended. Accordingly, where the intended definition of the word is not immediately apparent, its meaning must be determined by reference to the context in which the word is used and the underlying intent of the drafter. "As in all cases of statutory construction," the term "treaty" must be interpreted "in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), for example, the Court considered whether the word "treaty" in the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 827-828, which provided for direct appeal to this Court in cases involving the construction of "treaties," included international agreements to which the Senate had not consented. The agreement in question, which concerned important commercial relations between the United States and France, had not been submitted to the Senate pursuant to Article II of the Constitution. In holding that the agreement nonetheless was a "treaty" for purposes of the Circuit Court of Appeals, Act, the Court looked to the legislative intent and concluded that Congress "thought [it] best to preserve the right to a review by direct appeal * * * in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations *of that character* to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving

the peace of nations, should be subject to direct and prompt review by the highest court of the Nation" (224 U.S. at 600-601; emphasis added). Thus, even with regard to a subject matter as quintessentially domestic as the rules of procedure for direct appeal to this Court, the Court interpreted the word "treaty" in its international sense, as including all binding agreements among nations.

Similarly, this Court has held that "all international compacts and agreements" are to be accorded a dignity similar to that of a treaty made with the advice and consent of the Senate for the purpose of determining the validity of conflicting state law. In *United States* v. *Pink*, 315 U.S. 203, 222-223, 228-230 (1942), and *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937), the Court held that the Litvinov Assignment, by which the Soviet Union assigned certain claims it held against American nationals to the United States as part of this Nation's recognition of the Soviet government, although not approved by the Senate, had the effect of an Article II treaty, thus making it supreme over any inconsistent law or policy of New York State.[11]

The Court of Claims also has interpreted Congress' use of the word "treaty" as a reference to any binding international agreement. Specifically, the Court of Claims has construed the word "treaty" in 28 U.S.C. 1502, which provides that that court shall not have jurisdiction over claims against the United States

[11] More recently, in *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), the Court confirmed that the sovereign authority of the United States to settle claims of its nationals against a foreign state may be implemented by "executive agreement without the advice and consent of the Senate" as well as by a treaty in the constitutional sense (slip op. 20-21; footnote omitted).

"growing out of or dependent upon any treaty entered into with foreign nations," as including all international agreements. See *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 & n.17 (1976); *Yassin* v. *United States*, 76 F. Supp. 509, 517 (1948). The court explained that "[t]he reason for this equation is that the fundamental separation-of-powers policy underlying § 1502, *i.e.*, to avoid undue judicial interference (*e.g.*, by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact." *Hughes Aircraft Co.* v. *United States*, *supra*, 534 F.2d at 903 n.17.[12]

Indeed, Congress has used the word "treaty" in statutes that refer *only* to international agreements other than Article II treaties. For example, 39 U.S.C. 407(a) provides that

> [t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions * * *. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

Such "treaties" or conventions, however, which, by the terms of the statute, require only the consent of the President, are not Article II treaties. See *United*

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[12] In *Dames & Moore* v. *Regan*, *supra*, slip op. 31, this Court also implicitly recognized that the "treaty" exception to the Court of Claims' jurisdiction in 28 U.S.C. 1502 would include executive agreements such as the agreement between the United States and Iran, which was involved in that case.

States v. *Four Packages of Cut Diamonds*, 247 F. 354, 358 (S.D.N.Y. 1917); Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577, 588-589.[13]

Moreover, when Congress intends to refer solely to Article II treaties, it can be quite explicit. For purposes of the Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, Congress specifically defined the term "treaty" to mean "any international fishery agreement which is a treaty within the meaning of Section 2 of Article II of the Constitution." 16 U.S.C. 1802(23). Similarly, in the Arms Control and Disarmament Act, 22 U.S.C. (& Supp. III) 2551 *et seq.*, Congress authorized the Director of the Arms Control and Disarmament Agency to prepare

> recommendations concerning United States arms control and disarmament policy: *Provided, however,* That no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States; except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

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[13] Courts on occasion also use the word "treaty" to refer to an international agreement that is not an Article II treaty. See, *e.g.*, *Cotzhausen* v. *Nazro*, 107 U.S. 215, 217-218 (1883) (referring to the Treaty Concerning the Formation of a General Postal Union, *supra*, as a "treaty"); *Natural Resources Defense Council* v. *NRC*, No. 80-1477 (D.C. Cir. Mar. 30, 1981), slip op. 14 n.15 (using the word "treaty" to refer to the Agreement for Cooperation Concerning Civil Uses of Atomic Energy, June 13, 1968, United States-Philippines, 19 U.S.T. 5389, T.I.A.S. No. 6522, which is not an Article II treaty).

22 U.S.C. 2573. See also 15 U.S.C. 713a-7 ("whenever the President, by and with the advice and consent of the Senate, has concluded a treaty involving the exchange of surplus agricultural commodities produced in the United States which are held under loans made or made available by the Commodity Credit Corporation for stocks of strategic and critical materials produced abroad, the Commodity Credit Corporation is authorized * * * to accept such strategic and critical materials in exchange for such surplus agricultural commodities * * *").[14]

2. *The Context of Section 106 Suggests That the Word "Treaty" Was Used in That Statute in its International Relations Sense*

We have shown above that the use of the word "treaty" in a statute is not dispositive of congressional intent. A determination of whether the term was used in its international relations or its constitutional sense depends in large part on the context in which the term appears. Here, that context strongly suggests that Congress intended the word "treaty" to be defined according to the usages of international law.

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[14] 1 U.S.C. 112a, which requires the Secretary of State to cause the compilation and publication of "all treaties * * * and all international agreements other than treaties to which the United States is a party," and the Case Act, 1 U.S.C. (Supp. III) 112b, which requires the Secretary of State to transmit to Congress "the text of any oral international agreement, * * * other than a treaty, to which the United States is a party," are other examples of statutes in which Congress has made explicit by language or context (see note 25, *infra*) that it was using the word "treaty" in its constitutional sense. Congress did not do so in Section 106.

Section 106 provides, in pertinent part, that "no person shall be discriminated against by the Department of Defense * * * in the employment of civilian personnel at any facility or installation operated by the Department of Defense *in any foreign country* * * *" (emphasis added). The statute thus has no domestic impact. Rather, its only impact is upon actions of the United States in those foreign countries in which the Department of Defense is permitted to operate facilities or installations under applicable international agreements.

Whether the United States enters into an agreement with another country by means of an Article II treaty or some other form of international agreement, however, is a matter solely of domestic concern.[15] Obligations incurred by the United States and another nation are equally binding under international law, regardless of whether they are contained in an Article II treaty or some other form of international agreement. Accordingly, because Congress in Section 106 was legislating in an area touching directly on international relations, it is reasonable to assume that it used the word "treaty" in that statute in its international relations sense, as including all forms of binding agreements between the United States and a foreign country.

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[15] That domestic concern is the manner in which the agreement is brought into force—either by action of the President, with the advice and consent of two-thirds of the Senate, by action of the President pursuant to an Article II treaty, by action of the President pursuant to an Act of Congress ("congressional-executive agreements") or by action of the President alone ("sole executive agreements"). See L. Henkin, *Foreign Affairs and the Constitution* 173-177 (1972); *Restatement of the Foreign Relations Law of the United States* §§ 302(b), 306-308 (Tent. Draft No. 1, Apr. 1980).

Indeed, this conclusion is buttressed by the imprecise drafting of Section 106. As the district court observed, the language employed by Congress elsewhere in the section is so confusing as to rebut any notion that it used the word "treaty" in the strict and technical sense suggested by respondents (Pet. App. 30a; emphasis in original):

> Section 106 provides that "[u]nless *prohibited* by treaty, no person shall be discriminated against . . . ." [Petitioners] point out quite correctly that the term "prohibited" in this context is awkward, at best. It would have been more appropriate to state that "unless provided by treaty", or "unless permitted by treaty", no discrimination could occur. Whether the use of "prohibited" is an indication of sloppy draftsmanship or a more subtle intention of Congress cannot be ascertained at this point. The court does consider this confusing language significant, however, in evaluating [respondents'] contention that Congress chose its words carefully and meant just what it said when it used the word "treaty".

B. Principles of Statutory Construction Support An Interpretation Of The Word "Treaty" In Section 106 In Its International Relations Sense

In determining the meaning of an ambiguous statutory provision, it is appropriate to rely on "generalized axioms of experience in construing legislation." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Two settled principles of statutory construction apply to this case. The first is that repeals by implication are not favored. The second is that Congress will not be presumed to have placed the United States in violation of a binding in-

ternational obligation in the absence of a clearly expressed intention to do so. As we show below, both principles counsel a result contrary to the one reached by the court of appeals.

1. *Repeals by Implication Are Not Favored, Particularly When the Object of the Alleged Repeal is a Binding International Obligation*

It is by now axiomatic that repeals by implication are not favored. *Watt* v. *Alaska*, No. 79-1890 (Apr. 21, 1981), slip op. 7-8; *United States* v. *Will*, 449 U.S. 200, 221 (1980); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). As the Court remarked in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

This principle applies with special force when the allegedly repealed provision is a binding international obligation. The Court long ago held that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). In the absence of a clear legislative intent, statutes thus are to be construed so that they

do not conflict with customary international law or, *a fortiori*, existing provisions or obligations under binding international agreements. As Justice Brandeis wrote for the Court in *Cook* v. *United States*, 288 U.S. 102, 120 (1933), "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." Accord, *United States* v. *Payne*, 264 U.S. 446, 448 (1924) ("an intention to alter, and, *pro tanto*, abrogate [a] treaty, is not to be lightly attributed to Congress"); *Chew Heong* v. *United States*, 112 U.S. 536, 539, 549-550 (1884) ("the court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country"). See also *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951); *Clark* v. *Allen*, 331 U.S. 503, 510-514 (1947); *Restatement (Second) of the Foreign Relations Law of the United States* § 145, comment b (1965); L. Henkin, *Foreign Affairs and the Constitution* 171 (1972); C. Hyde, *International Law Chiefly As Interpreted And Applied By The United States* 1464 (1947).

The rule that an intent to abrogate existing international obligations will not lightly be presumed from subsequent congressional action is not limited to commitments with other nations contained in Article II treaties.[16] To the contrary, it is a cardinal principle

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[16] A distinction between Article II treaties and other forms of international agreements would make no sense in this context. In view of the great number of international agreements other than Article II treaties to which the United States is a party (see L. Henkin, *supra*, at 173, 420 n.1) and the fact that international law recognizes no distinction between the two forms of agreement (see page 23, *supra*), a domestic presumption in favor of the continued viability of

of international law that "[*e*]*very* [international agreement concluded between states] is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra*, Art. 2(1)(a) and 26, 63 Am. J. Int'l L. at 876, 884 (emphasis added). Because repudiation of an international agreement would have the same repercussions as the abrogation of a treaty, the rule against implied repeal is equally applicable to both forms of commitment.

Moreover, this Court has described the Executive "as the sole organ of the federal government in the field of international relations * * *. [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries * * *. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).[17] See *Haig* v.

Article II treaties alone surely would detract from the United States' credibility in the international arena.

Moreover, to whatever extent the presumption that Congress does not intend to abrogate pre-existing international agreements is based on the Senate's participation in the conclusion of Article II treaties, the presumption also applies to "congressional-executive agreements" (see note 15, *supra*), such as the MBA (see *Williams* v. *Rogers*, 449 F.2d 513, 520 & n.12 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972)) and the BLA. As noted above (see pages 2-3, *supra*), both the MBA and the BLA were concluded pursuant to Congress' broad grant of authority to the President "by such means as he finds appropriate[,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States" (22 U.S.C. 1392).

[17] Of particular note in the context of the present case is this Court's characterization in *Curtiss-Wright* of "the power

Agee, *supra*, slip op. 10, 26; *Chicago & Southern Air Lines, Inc.* v. *Waterman, SS. Corp.*, 333 U.S. 103, 109-111 (1948); *United States* v. *Belmont*, *supra*, 301 U.S. at 330. See also *Goldwater* v. *Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring); *id.* at 1006-1007 (Brennan, J., dissenting). In view of the paramount role in the conduct of foreign affairs that the Constitution has delegated to the Executive, it is most unlikely that Congress would ever intend, without saying so, to force this Nation to renege on an international obligation undertaken by the President (either with or without the Senate's advice and consent). Cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra*, 372 U.S. at 20 (construing the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, as not applying to the foreign crew of a vessel flying a foreign flag because, *inter alia*, such a construction would be contrary to the recognition long afforded such vessels by the Department of State).

2. The Decision of the Court of Appeals Forces the United States to Breach an Agreement Made With a Foreign Country in Exchange for Significant Considerations Within That Country's Territory

Limiting the meaning of the word "treaty" in Section 106 to Article II treaties would not only partially repeal the 1944 Act authorizing the President to withhold, acquire or retain military bases in the Philippines "by such means as he finds appropriate" (see page 2, *supra*), as the court of appeals noted (Pet.

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to make such international agreements as do not constitute treaties in the constitutional sense" (relying on *B. Altman & Co.* v. *United States*, *supra*) as "inherently inseparable from the concept[] of nationality." 299 U.S. at 318.

App. 15a n.30). It also would impliedly "repeal" this Nation's commitment to the Philippines—given in exchange for that country's granting the United States the right to use military facilities located in the Philippines—to fill the needs for civilian employment at the bases used by the United States with Filipino citizens in accordance with the terms of the BLA. Such an implied "repeal," however, notwithstanding whatever effect it may have for *domestic* purposes,[18] would have no effect upon the United States' binding *international* obligation under the BLA to prefer Filipino citizens for civilian employment on the bases. See L. Henkin, *supra*, at 164; C. Hyde, *supra*, at 1465; *Restatement (Second) of the Foreign Relations Law of the United States*, *supra*, at § 145(2).

The Base Labor Agreement and the Military Bases Agreement, which it supplements, are inextricably related to the United States' relations with the Philippines, as well as to this Nation's security and defense (see note 1, *supra*). The agreements define the conditions under which the United States is permitted to maintain a military presence in the Philippines, a presence that is vital to the protection of United States' interests in the Middle East and the Indian and Pacific Ocean regions. The provision of the BLA that gave rise to this lawsuit—the United States' obligation to satisfy its needs for civilian employment

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[18] Section 145(1) of the *Restatement (Second) of the Foreign Relations Law of the United States*, *supra*, provides that "[a]n Act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed."

with Filipino citizens—has been a significant *quid pro quo* for the Philippines to permit the United States to use military bases located on its soil. As the Department of State remarked in 1977, the question of civilian employment on bases used by the United States in the Philippines "has long been a sensitive one. The Government of the Philippines believes that at military bases on Philippine territory it is appropriate that Filipino citizens be employed to the maximum extent possible. The Government of the Philippines has been adamant on that point, and the limited exceptions provided for in Article I of the Base Labor Agreement are the only concessions it has been willing to grant in this respect." Letter from Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 211).[19] Affirmance of the decision below thus would require the United States to breach what the Philippines views as a key provision of the BLA, with unpredictable consequences for our relations with that country and for the United States' continued use of military facilities located there.

In addition, the United States remains a party to several other binding international agreements that, like the BLA, provide some form of employment preference for local nationals in exchange for the right to maintain a United States military presence on foreign soil, but are not Article II treaties (see notes 3 and 4,

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[19] As of June 30, 1981, the Department of Defense employed 13,600 Filipino citizens at its military facilities in the Philippines. Department of Defense, Total Civilian Personnel Strengths By Regional Area And By Country, Military Functions—Summary (June 30, 1981), Table P309B at 2.

supra).[20] It is even more difficult to predict the consequences that a breach of the BLA by the United States would have on its relations with these other countries and on the continued availability to the United States of the military facilities located there. One fair assumption, however, is that the court of appeals' decision, unless reversed, undoubtedly will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere.[21] It strains credulity to suggest that Congress would have intended such drastic consequences in the absence of a clearly expressed legislative intent to bring them about. As this Court stated in *Clark* v. *Allen*, *supra*, 331 U.S. at 511-512 (footnotes omitted), in rejecting the argument that the power to vest alien property in an agency of the United States arising out of the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, impliedly repealed the right to inherit granted to resident German aliens under the pre-existing Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, 44 Stat. 2132 *et seq.*:

> To give the power to vest [that] effect * * * would, indeed, prove too much. * * * Provisions

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[20] The agreements between the United States and the Republic of China (Taiwan) cited in note 3, *supra*, have been terminated. See Department of State, *Treaties in Force* 244-246 (Jan. 1, 1981).

[21] The Article II treaty process is time consuming and may not be feasible in some situations. Moreover, the Department of State advises us that foreign countries frequently wish to avoid the formality and high visibility of an Article II treaty. The decision below, which would require every international agreement containing local national hiring preference provisions to be in the form of an Article II treaty, thus substantially reduces negotiating flexibility.

comparable to that contained in [the treaty with Germany] are found in existing treaties with friendly nations. We will not readily assume that when Congress * * * authorized the vesting of property, it had a purpose to abrogate all such treaty clauses.

C. The Legislative History Supports A Construction Of The Word "Treaty" In Section 106 That Includes All Binding International Agreements

1. *The Legislative History Makes No Mention Of The Several Existing International Agreements That Would Be Called Into Question If The Word "Treaty" In Section 106 Were Construed In Its Constitutional Sense*

The legislative history of Section 106 is concededly sparse (Pet. App. 9a, 31a, 32a n.4). The expressions of congressional intent that do exist, however, do not support the court of appeals' construction of the statute. Indeed, the legislative record is more significant for what it does not contain—*any* expression of a congressional intent to abrogate provisions in the numerous existing agreements with allies providing employment preferences for local nationals. We submit that "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

At the time Section 106 was enacted, at least 14 binding international agreements, none of which had been submitted to the Senate, provided for local national employment preferences at military facilities in foreign countries used by the United States.[22] Nowhere in the legislative history of Section 106 is there

[22] See note 3, *supra*.

any mention of these existing international agreements or any discussion of the impact that Section 106 would have on them. Nor was there any testimony by the Department of State or the Department of Defense concerning the anti-discrimination provision, as there surely would have been had the validity of these existing international agreements been subject to challenge.

Moreover, Congress obviously felt the need to include an exception for "treaties" in Section 106, yet the Article II format had never been employed to establish local national hiring preferences at military bases used by the United States abroad.[23] Congress' failure to discuss the impact that Section 106 would

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[23] The criteria used to determine the form that the United States should use in entering into an international agreement are contained in 11 Foreign Affairs Manual, Chapter 700 (Oct. 25, 1974) (usually referred to as the Circular 175 Procedures). These criteria include: (a) the extent to which the agreement involves commitments or risks affecting the nation as a whole; (b) whether the agreement is intended to affect state laws; (c) whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (d) past United States practice as to similar agreements; (e) the preference of the Congress as to a particular type of agreement; (f) the degree of formality desired for an agreement; (g) the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (h) the general international practice as to similar agreements. 11 Foreign Affairs Manual, *supra*, at 721.3. The foregoing criteria support the traditional use of a non-Article II format for negotiating labor rights on foreign bases. See *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 256-258 (1972) (statement of John R. Stevenson, Legal Adviser, Department of State).

have on the binding international agreements then in force, combined with the absence of any Article II treaties addressing the hiring preference issue, strongly suggests a legislative understanding that all agreements concluded by the President and having the force of law in the international arena would be exempt from Section 106 by virtue of its "treaty" exception.

2. The Legislative History Indicates That Section 106 Was Directed Against Actions By Individual Military Base Commanders Rather Than Against International Agreements Concluded By The President

Further evidence of Congress' intent to include all binding international agreements within the meaning of the word "treaty," as used in Section 106, is supplied by the scant legislative history that does exist.

The provision that became Section 106 was added to H.R. 6531, 92d Cong., 1st Sess. (1971) (which was later enacted as Pub. L. No. 92-129) under the sponsorship of Senator Schweiker, while H.R. 6531 was under consideration by the Senate Committee on Armed Services. See 117 Cong. Rec. 14395 (1971) (remarks of Sen. Stennis); *id.* at 16126 (remarks of Sen. Cook); *id.* at 16133 (remarks of Sen. Schweiker). See generally S. Rep. No. 92-93, 92d Cong., 1st Sess. 6, 23 (1971). Subsequently, Senator Schweiker, together with, among others, Senator Hughes, sponsored a much broader amendment to H.R. 6531. That broader amendment, which came to be known as the Hughes-Schweiker Amendment, called for a limitation of the extension of the military draft from two years to one year and for increases in military pay. See 117 Cong. Rec. 16120-16121, 16128, 16132 (1971) (remarks of Sen. Schweiker); *id.* at

16123 (remarks of Sen. Hughes); S. Rep. No. 92-93, *supra*, at 62-63 (supplemental views of Sens. Symington, Schweiker and Hughes). It appears that the only references to Section 106 occurred within the context of Congress' consideration of the much broader, but closely related, issue of military pay raised by the Hughes-Schweiker Amendment.

Debate concerning the military pay aspect of the Hughes-Schweiker Amendment focused on the economic hardship suffered by many American service members overseas, which was caused in part by the fact that their dependents could not obtain employment in the local economies because of their tourist visa status. See 117 Cong. Rec. 16126 (1971) (remarks of Sens. Cook and Hughes). That situation had been drastically exacerbated by the unilateral action of the Commanding General of the European Exchange System (EES), General Charles H. Phipps. In early 1971, in an effort to reduce "spiraling wage costs," General Phipps had issued a memorandum encouraging all EES elements to recruit and hire local nationals. See 117 Cong. Rec. 14394-14397, 16128, 16133 (1971) (remarks of Sen. Schweiker).

During the floor debates, Senator Schweiker focused on the Phipps memorandum and on the plight of American service members in Germany's expensive economy. 117 Cong. Rec. 14394-14397, 16128-16129, 16131-16133 (1971). His remarks indicate outrage at General Phipps' unilateral action, which Senator Schweiker viewed as insensitive to the economic circumstances of American soldiers and their families (*id.* at 14395; emphasis added):

> I have never heard of anything so ridiculous in my life. We actually send our GI's to Europe at poverty wages. We do not pay to send the wives there. They have to beg or borrow that

> money. They get over there, and if they do bring their wives at their own expense, the wives cannot even go to the Army Exchange Service and get a job, *because a general has sent out a memorandum that says we are going to give those jobs to the nationals of the countries involved.*
>
> How ridiculous can one policy be? No wonder we do not have an all-volunteer army. No wonder we do not have people volunteering, with that kind of rank discrimination against the wives of American citizens.
>
> * * * * *
>
> I cannot imagine that any other country in the world would treat its citizens in that way—bar none.

General Phipps' action, however, was not mandated by any international agreement; indeed, it violated the Department of Defense policy embodied in the Dependent Hire Program. 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker). See also *Authorization for Average Annual Strengths for the Military Services for Fiscal Year 1972: Supplemental Manpower Hearing on H.R. 6531 Before the Senate Comm. on Armed Services*, 92d Cong., 1st Sess. 77 (1971) (statement concerning employment of dependents of military and civilian personnel in foreign areas).

That Senator Schweiker's addition of Section 106 in committee was directed against actions of individual officers, like General Phipps, rather than against binding international obligations of the United States, like those contained in the BLA, is apparent from Senator Schweiker's responses to two suggestions made in an article that appeared in *Stars & Stripes* (a semi-official newspaper produced for United States personnel abroad), parts of which he

read into the record (see 117 Cong. Rec. 16128-16129, 16131-16133 (1971)). At one point the article suggested (*id.* at 16132) that

> [m]ost civilian jobs with the U.S. military in Europe are occupied by local nationals (Europeans). Most of these jobs could be done, and probably done better, by American dependents * * *. If American soldiers and dependents had these jobs instead, it would bring many of the enlisted families out of poverty.

Senator Schweiker's response (*ibid.*)—"[j]ust a simple Executive order would change this"—indicates that he did not view local national hiring preferences established by international agreements as the evil to be remedied by Section 106. Rather, Senator Schweiker's introduction of Section 106 must have been aimed at employment preferences established by individual base commanders because, while an executive order would have sufficed to overrule a directive by an individual commander like General Phipps, it would not have relieved the United States of its obligations under any form of international agreement.

At another point, the newspaper article stated that (117 Cong. Rec. 16128 (1971) (remarks of Sen. Schweiker)) "[p]ortions of SOFA [the Status of Forces Agreement] could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals * * *." Senator Schweiker responded (*ibid.*):

> Mr. President, let me interject there that we have done some research and find that, in Germany particularly, that is not the case. Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:

> For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.
>
> Here is an American general saying that when the GI's go to their canteen or service post exchange and spend their money, they do not even have the right to have their wives working there because we should give those jobs to German nationals.

Hence, it is clear that Senator Schweiker viewed as the problem not the United States' status of forces agreement with Germany, but rather the type of situation that could be created by a single officer's order made in contravention of existing military policy of hiring dependents whenever possible (see page 36, *supra*).

Moreover, the absence from Senator Schweiker's extended remarks (see, *e.g.*, 117 Cong. Rec. 14394-14397, 16120-16122 (1971)) of any references to local employment preferences at military bases outside of Germany also counsels against the court of appeals' narrow construction of the word "treaty" in Section 106. Specifically, Senator Schweiker never alluded to the bases in the Philippines or the hiring preference required by the BLA. This is not surprising, since Senator Schweiker's concern with service members' cost of living in Europe would have had no application to the Philippines, where the cost of living is far below that in Europe. Indeed, the committee reports' only mention of Section 106 is the statement that "[t]he purpose of this amendment is to correct a situation which exists *primarily on some American bases in Europe.*" S. Rep. No. 92-93, *supra*, at 23

(emphasis added); accord, H.R. Conf. Rep. No. 92-433, 92d Cong., 1st Sess. 31 (1971).

Instead of according the appropriate deference to the views of Senator Schweiker, the principal sponsor of Section 106 (see *Simpson* v. *United States*, 435 U.S. 6, 13 (1978)), the court of appeals relied almost entirely (Pet. App. 14a) on an isolated remark by Senator Hughes that wives of servicemen "are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *" (117 Cong. Rec. 16126 (1971)). It is difficult to ascribe any weight to this ambiguous remark. As noted above (see page 34, *supra*), the Hughes-Schweiker floor amendment was concerned with limiting the extension of the draft from two years to one year and increasing military pay. Senator Hughes' particular focus was on the need for increased military pay (117 Cong. Rec. 16120 (1971) (remarks of Sen. Schweiker); *id.* at 16124-16126 (remarks of Sen. Hughes)). During the debates, this need for improved compensation was linked with the inability of service members' dependents to obtain employment in the local economies because of their tourist visa status. 117 Cong. Rec. 16126 (1971) (remarks of Sens. Cook and Hughes). Significantly, the statement of Senator Hughes relied on by the court of appeals immediately follows his observation (*ibid.*) that servicemen "in the lowest ranks cannot have their wives obtain anything but a tourist visa" and echoes Senator Cook's comments on the same point (*ibid.*):

> On my inquiry of the Defense Department, it was my understanding that there was an agreement, through the NATO organization, that those young wives, because they were there on tourist

visas, could not get a work permit under any circumstances.

Accordingly, it may be that Senator Hughes failed to appreciate that while work permit visas are required of United States dependents who work in the local economies of host nations, such visas are not required of United States citizens who are employed on United States military bases overseas. Therefore, his remarks about "agreements" may erroneously have referred to provisions concerning the visa status of American military dependents rather than to employment preference agreements such as the BLA.

In any event, Senator Hughes' brief statement, occurring as it does in a confused context and contradicting the clear understanding of the primary sponsor of Section 106, provides no basis for a finding of a "clear legislative intent" to abrogate obligations contained in more than a dozen binding international agreements to which the United States was a party. To the contrary, the legislative record supports the conclusion that Section 106 was intended to prevent future actions by individual Department of Defense commanders, and that the "treaty" exception was intended to ensure that obligations under binding international agreements would not be disturbed.

D. The Executive Has Consistently Interpreted the Word "Treaty" in Section 106 As Including All Binding International Agreements, And Congress Has Been Informed Of And Has Acquiesced In That Interpretation

Since the enactment of Section 106 in 1971, the United States has entered into at least five additional international agreements that contain some form of local national employment preferences but are not

in the form of Article II treaties.[24] Each of these agreements was submitted to Congress pursuant to the Case Act, 1 U.S.C. (Supp. III) 112b.[25] We are

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[24] See note 4, *supra*.

[25] The court of appeals relied (Pet. App. 16a-18a) on the fact that the same Congress that enacted Section 106 also passed the Case Act, 1 U.S.C. 112b, which, as originally enacted, required the Secretary of State to submit to Congress "the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter." But Congress' use of the word "treaty" in the Case Act is not controlling in this wholly different context.

First, it is hardly surprising that Congress would distinguish between Article II treaties and other international agreements in a statute requiring the submission of documents by the Executive branch, because submission of the former category of documents to the Senate was already required by Article II, Section 2 of the Constitution. Moreover, while the court below admitted (Pet. App. 17a) that "the general subject matter treated in the two enactments is not the same," it drew on what it thought "may have been" "a similar concern" of both statutes, that is, a congressional desire to check presidential power (*ibid.*). Such a concern does not appear to have played a part in the enactment of the Case Act (see 118 Cong. Rec. 4090-4091 (1972) (remarks of Sen. Case); *id.* at 4093 (remarks of Sen. Bentsen) ("[w]e do not want to tie the President's hands in his efforts to engage in foreign policymaking")), which, after all, only requires notice to Congress of international agreements *after* they have been concluded. In any event, there is no basis for assuming that a desire to check presidential power was the motivation for Section 106. It is unreasonable to believe that Congress sought to control the Executive branch by requiring only that one particular issue usually addressed in executive agreements must be dealt with in the Article II treaty format.

Indeed, during the past decade several legislative proposals were introduced that would have restricted the ability of the

advised that no member of Congress has expressed concern to the Department of State that any of these agreements runs afoul of Section 106.

Other post-enactment legislative history confirms that Congress is aware that the inclusion of hiring preferences in international agreements that have not been submitted to the Senate has continued since the passage of Section 106. In considering subsequent Department of Defense appropriations requests, Congress has explicitly recognized (H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978)) that "[f]oreign nationals are employed either directly or indirectly in virtually all countries where U.S. forces are deployed. The United States and the host country have administrative agreements (referred to as Status of Forces Agreements) which define and prescribe requirements that military departments are

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Executive branch to conclude non-Article II treaties, especially those related to the presence of United States forces overseas (for example, by requiring that such agreements be submitted to the Senate for its advice and consent or by providing that Congress could disapprove of such agreements by concurrent resolution). See, *e.g.*, S. 3475, 92d Cong., 2d Sess. (1972); S. 3637, 92d Cong., 2d Sess. (1972); H.R. 1268, 94th Cong., 1st Sess. (1975); H.R. 1273, 94th Cong., 1st Sess. (1975); H.R. 5489, 94th Cong., 1st Sess. (1975); H.R. 4438, 94th Cong., 1st Sess. (1975). See generally E. McDowell, *Digest of United States Practice In International Law 1976*, at 242-263 (1977). None of these restrictive provisions was enacted. As this Court stated in *Dames & Moore* v. *Regan*, *supra*, slip op. 27, "[i]t is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that every purpose *sub silentio* through [Section 106]."

obligated to observe in satisfying their local civilian labor needs." See also *Department of Defense Authorization for Appropriation for Fiscal Year 1979: Hearings on S. 2571 Before the Senate Comm. on Armed Services*, 95th Cong., 2d Sess. 2369-2371 (1978); *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 248, 256-258 (1972) (statement of John R. Stevenson, Legal Adviser, Department of State); Reply Memorandum for the Petitioners 1a-7a; A. 207-211. Congress, however, has not chosen to alter this consistent administrative construction.[26] Such a " 'long-continued practice, known to and acquiesced in by Congress, * * * raise[s] a presumption that the [action] has been [taken] in pursuance of its consent . . . .' " *Dames & Moore* v. *Regan*, *supra*, slip op. 28, quoting *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915); accord, *Haig* v. *Agee*, *supra*, slip op. 9-10.

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[26] The court of appeals correctly noted (Pet. App. 15a n.30) that its view coincided with an interpretation of Section 106 that had been rendered by the General Accounting Office (see A. 203-206). We dispute, however, the court's similar, unqualified characterization (Pet. App. 15a n.30) of the Department of State's pre-1977 construction of Section 106 (see A. 220-225). In any event, the Department of State and the Department of Defense, the agencies most closely involved in the negotiation and implementation of international agreements concerning rights to military bases abroad, have made clear their interpretation of Section 106, both through the conclusion of several post-Section 106 international agreements (see note 4, *supra*) and in their written communications (see Reply Memorandum for the Petitioners 1a-7a; A. 207-219).

In sum, Congress expressly authorized the President to acquire, withhold and retain military bases in the Philippines "by such means as he finds appropriate" (22 U.S.C. 1392). As we have shown, Congress, since the enactment of Section 106, has acquiesced in the Executive's use of the means found appropriate in the case of the Philippines—local national hiring preferences contained in non-Article II treaties—in the context of agreements with other foreign nations. In these circumstances, and particularly in the absence of any evidence of a clear legislative intent to abrogate provisions of existing international agreements granting the United States significant military advantages, no such intent should be attributed to Congress. Rather, the "treaty" exception in Section 106 should be construed to encompass all binding international agreements to which the United States is a party, including the BLA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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